SUPREME COURT, U. S.

FILED

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NO. 1269

IN THE

Supreme Court of the United States

October Term, 1968

RICHARD L. DUGGER, *Petitioner*

v.

MISSOURI PACIFIC RAILROAD COMPANY,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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NO. 1

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Richard L. Dugger prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit affirming a summary judgment adverse to him granted by the District Court of the United States for the Southern District of Texas, wherein the plaintiff Dugger, a veteran reemployed pursuant to the Universal Military Training and Service Act (50 U.S.C. App. §459) was denied paid vacations in the years 1965 and 1966 claimed by him from the defendant employer, Missouri Pacific Railroad Company.

OPINIONS BELOW

An opinion was rendered by the District Court which has been published and was referred to in the *per curiam* opinion of the Court of Appeals. *Dugger v. Missouri Pacific Railroad Company*, D.C. S.D. Tex. 1967, 276 F. Supp. 496. The opinion of the Court of Appeals was entered on December 3, 1968 and has not yet been published. The opinion of the Court of Appeals denying the Petition for Rehearing was entered on January 24, 1969 and has not yet been published. The first of these opinions appears in the record and the latter two opinions in the official transcript filed with the papers in this petition (Tr. 168-169 and 179-180 respectively).

JURISDICTION

The judgment of the Court of Appeals was entered on December 3, 1968, and the order overruling the appellant's petition for rehearing was entered on January 24, 1969. The jurisdiction of this Court is invoked under §1254(1) and §2101(c), Title 28, United States Code.

QUESTIONS PRESENTED

Whether, under the Universal Military Training and Service Act, as amended and as construed by this Court in *Accardi v. Pennsylvania R. Co.*, 383 U.S. 225 (1966) and *Eagar, et al v. Magma Copper Co.*, 389 U.S. 323 (1967), a returning veteran is entitled to a paid vacation when the collective bargaining contract under which he works specifies that an employee must have performed 110 days of "compensated service" during the year previous to that in which the vacation is to be granted and when the veteran is unable to perform such compensated

service by reason of having been on active military duty during such preceding year.

STATUTE INVOLVED

Act of June 24, 1948, c. 625, Title I, §9, 62 Stat. 614, as amended, Title 50 App. U.S.C.A. §459:

* * *

(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position (other than a temporary position) in the employ of any employer and who (1) receives such certificate, and (2) makes application for re-employment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

* * *

(B) if such position was in the employ of a private employer, such person shall—

(i) if still qualified to perform the duties of such position, be restored by such employer or his successor in interest to such position or to a position of like seniority, status, and pay;

* * *

(c) (1) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) [of this section] shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was

inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

(2) It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) [of this section] should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.

* * *

(g) (4) Any employee not covered by paragraph (3) of this subsection who holds a position described in paragraph (A) or (B) of subsection (b) of this section shall upon request be granted a leave of absence by his employer for the period required to perform active duty for training or inactive duty training in the Armed Forces of the United States. Upon his release from a period of such active duty for training or inactive duty training, or upon his discharge from hospitalization incident to that training, such employee shall be permitted to return to his position with such seniority, status, pay, and vacation as he would have had if he had not been absent for such purposes. . . ."

STATEMENT OF THE CASE

The trial court stated the facts regarded as controlling as follows (R. 160-161):

> "Dugger began working for the Missouri Pacific Railroad Co. in 1962, as a machinist apprentice at defendant's Settegast Diesel Shop in Houston, Texas. At that time there was in effect a labor agreement between defendant and its employees which, in part, provided as follows:

> Effective with the calendar year 1961, an annual vacation of ten (10) consecutive days with pay will be granted to each employee covered by this Agreement who renders compensated service on not less than one hundred ten (110) days during the preceding calendar year and who has three (3) or more years of continuous service. . . .

"Plaintiff rendered a sufficient amount of compensated service in 1962 to entitle him to a paid vacation in 1963. Although Dugger entered the military service in August, 1963, he performed enough compensated service in that year to earn a paid vacation in 1964, for which he was paid. Plaintiff did not perform any compensated service for the defendant in 1964.

"Dugger was discharged from the military service on July 31, 1965 and returned to his former position with the defendant on September 1, 1965. Due to the fact that plaintiff did not return to work until September of 1965, he was able to work only eighty-five (85) compensated days by the end of the calendar year. Treating Dugger as one who had been on furlough or leave of absence, defendant reasoned that he had failed to work the required period of time in 1964 and 1965 to entitle him to a paid vacation in 1965 and 1966."

At the time when the trial court granted defendant's motion for summary judgment, this Court had already decided *Accardi v. Pennsylvania R. Co.*, 383 U.S. 225 (1966), but had not yet decided *Eagar, et al v. Magma Copper Co.*, 389 U.S. 323 (1967). The trial court relied upon the decision of the Court of Appeals for the Ninth Circuit, sub. nom. *Magma Copper Company v. Eagar*, 380 F.2d 318 (C.A. 9, 1967), and distinguished this Court's decision in *Accardi*, as had the Court of Appeals

in *Magma*. This Court later summarily reversed *Magma*, citing *Accardi. Eagar, et al v. Magma Copper Co.*, 389 U.S. 323 (1967). Still later, the Court of Appeals by its brief *per curiam* opinion in substance adopted the opinion of the District Court without discussing or even mentioning the effect of this Court's later decision in *Magma* upon the reasoning behind the District Court's decision.

REASONS FOR GRANTING THE WRIT

In *Accardi, supra,* this Court held without qualification that "the failure to credit petitioners' 'compensated service' time with the period spent in the armed services does not accord petitioners the right to be reinstated 'without loss of seniority' guaranteed by §§8(b)(B) and (c) [of the Selective Training and Service Act of 1940]." This Court has never subsequently qualified this holding, and in *Eagar, et al v. Magma Copper Company,* 389 U.S. 323 (1967), decided that the principle stated applies to vacation benefits as well as to the severance benefit involved in *Accardi.*

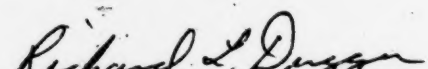
There have since been conflicting decisions in the courts below. In the case at bar, the holdings in *Accardi* and *Magma* have been interpreted restrictively to deny benefits to the petitioner. In other decisions, e.g. *Kelly v. C.R.I. & P. R. Co.*, 293 F. Supp. 423 (W.D. Okla., 1968), on all fours with the case at bar, the decision in *Magma* has been given its natural force and effect, and recovery allowed.

While the sums of money involved in each case may be relatively small, the question presented is of wide general interest. As the respondent-appellee pointed out

below, the position taken by the railroad is based upon their interpretation of a national agreement. The conflict between the rights granted plaintiff-petitioner by the Act and the railroad's interpretation of the contract potentially affects any veteran returning to railroad employment in the classes covered by the agreement. If the natural effects of *Accardi* and *Magma* are to be restricted as has been done in the case at bar, it should be done by this Court and not left to the various and conflicting decisions which have come forth below. Otherwise, the petitioner and the many others in his class should receive the benefits which are their due.

CONCLUSION

For the reasons stated, the decisions below should be reversed.



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APPENDIX A

(Caption Omitted)

OPINION OF COURT OF APPEALS

(December 3, 1968)

Before JONES and COLEMAN, Circuit Judges, and CHOATE, District Judge.

PER CURIAM: The appellant, Richard L. Dugger, brought an action against his employer, Missouri Pacific Railroad Company, claiming vacation pay under Section 9 of the Universal Military Training and Service Act, 50 U.S.C.A. Sec. 459. The district court concluded that any right to vacation pay must depend upon the terms of the labor agreement between the railroad and its employees. Under this agreement, the district court decided, no vacation pay should be awarded. *Dugger v. Missouri Pacific Railroad Company,* D.C. S D. Tex. 1967, 276 F. Supp. 496. From the district court judgment Dugger has appealed. The decision of the district court is sound and its judgment should be and is

AFFIRMED.

APPENDIX B

(Caption Omitted)

OPINION ON PETITION FOR REHEARING

(January 24, 1969)

Before JONES and COLEMAN, Circuit Judges, and CHOATE, District Judge.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

APPENDIX C

(Caption Omitted)

JUDGMENT OF DISTRICT COURT REPORTED 276 F. SUPP. 496

(Filed Nov. 20, 1967)

The plaintiff instituted this suit against his employer, Missouri Pacific Railroad, to recover damages for vacation benefits he asserts that he is entitled to under the Universal Military Training and Service Act, 50 U.S.C. App. §459. The cause is before the court on defendant's motion for summary judgment. The facts are not in dispute.

Dugger began working for the Missouri Pacific Railroad Co. in 1962 as a machinist apprentice at defendant's Settegast Diesel Shop in Houston, Texas. At that time there was in effect a labor agreement between defendant and its employees which, in part, provided as follows:

> Effective with the calendar year 1961, an annual vacation of ten (10) consecutive days with pay will be granted to each employee covered by this Agreement who renders compensated service on not less than one hundred ten (110) days during the preceding calendar year and who has three (3) or more years of continuous service. . . .

[125] Plaintiff rendered a sufficient amount of compensated service in 1962 to entitle him to a paid vacation in 1963. Although Dugger entered the military service in August, 1963, he performed enough compensated service in that year to earn a paid vacation in 1964, for which he was paid. Plaintiff did not perform any compensated service for the defendant in 1964.

Dugger was discharged from the military service on July 31, 1965 and returned to his former position with the defendant on September 1, 1965. Due to the fact that plaintiff did not return to work until September of 1965, he was able to work only eighty-five (85) compensated days by the end of the calendar year. Treating Dugger as one who had been on furlough or leave of absence, defendant reasoned that he had failed to work the required period of time in 1964 and 1965 to entitle him to a paid vacation in 1965 and 1966.

There is no dispute between the parties that had Dugger been absent from work in 1964 and 1965 for reasons other[1] than military service, he would not have been entitled to a paid vacation in 1965 and 1966. Plaintiff, however, asserts that irrespective of the terms of the labor agreement, he was entitled to a paid vacation in each of these years under the provisions of the Universal Military Training and Service Act, 50 U.S.C. App. §459.[2]

There is no genuine issue as to any material fact. The issue before the court is whether defendant is entitled to a judgment as a matter of law. Fed. R. Civ. P., Rule 56.

The Universal Military Training and Service Act provides that if a person leaves a position with a private employer because he is inducted into the armed forces for training and service, and upon discharge from the armed forces is qualified [126] to perform the duties for the private employer, he shall "be restored by such employer

1. This statement serves for illustration and does not mean that there were no excusable absences under the agreement.

2. Plaintiff has admitted that in all other respects he has received the treatment, pay, and benefits appropriate to his class and craft.

. . . to such position or to a position of like seniority, status, and pay. . . ." Section 459(b)(B)(i). Section 459(c)(1) further provides that if the person is restored to such a position, he:

> shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be restored without loss of seniority, *shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practice relating to employees on furlough or leave of absence* in effect with the employer at the time such person was inducted into such forces. . . .[3] (Emphasis added.)

The only provision in the labor agreement which related to vacation credit of an employee who had been in the armed forces provided that an employee who either worked seven months or performed service sufficient to qualify him for a vacation in the year prior to becoming a member of the armed forces was entitled to a credit of the time spent with the armed forces in determining the *length* of vacations for which he would qualify upon his return.[4]

---

3. Section 459(c)(2) continues to say;
[A]ny person who is restored to a position . . . should be so restored in such a manner as to give him such *status* in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.
(Emphasis added.)
This paragraph is inapplicable to the case at hand, for the dispute does not concern Dugger's *status*. See Bozar v. Central Penn. Quarry, Stripping & Constr. Co., 73 F.Supp. 803, 810, 813 (M.D. Penn. 1947).

4. The vacation provisions were scaled to the number of years the employee had worked for the railroad. It will be seen later that this clause has no application to the issue in controversy.

Plaintiff argues that the Act requires that a veteran be treated as though he had worked for the employer continuously during the period of his service in the armed forces.[5] If, he says, the labor agreement were applied to veterans independent of this Act, the result would be to discriminate against veterans. This, the plaintiff contends, is exactly what the Act was designed to avoid. In effect, Dugger takes the position that the Act requires the employer to treat a returning veteran as though he had remained with the railroad and had performed a sufficient amount of service to earn a paid vacation for the year of his return and the following year.

Vacation rights of the sort being claimed by plaintiff [127] have been classified as "other benefits" in which the veteran is entitled to participate under Section 459(c)(1). *Magma Copper Co. v. Eagar*, 380 F.2d 318, 321 (9th Cir. 1966); *Siaskiewicz v. General Electric Co.*, 166 F.2d 463, 466 (2d Cir. 1948);[6] Annot *Re-employment of*

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5. This argument was expressly rejected in Siaskiewicz v. General Electric Co., 166 F.2d 463, 465 n.4 (2d Cir. 1948).

6. Plaintiff vigorously asserts Accardi v. Pennsylvania R.R. Co., 383 U.S. 225 (1966), as support for his position. *Accardi* brings to light the distinction between the seniority aspect (length of vacation relative to length of service) of vacation privilege and the employee's right to a paid vacation at all. *Accardi* deals with the seniority aspect and did not deal with vacation rights as "other benefits." See *Magma*, 380 F.2d at 321-22. In fact, the labor agreement in effect is the case at hand provided for the *Accardi* situation.

Plaintiff also argues that amended section 459 (g)(4) is applicable, at least in spirit, to this case. That subsection provides that the returning employee shall have such "seniority, status, pay, and vacation as he would have if he had not been absent for such purpose." Subsection (g)(4) differs from subsection (c)(1) in that (g)(4) is designed for persons granted a leave of absence to perform active or inactive training in the armed forces.

Section 459 has been amended several times subsequent to the decisions herein cited, and Congress must have been aware of the

Veterans, 29 A.L.R. 2d 1279, 1324-27 (1953). Dugger is entitled to participate in vacation rights to the extent that they are "offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence. . . ." Section 459 (c)(1). Thus, Dugger, as a returning veteran, is not entitled to vacation rights which non-returning veteran employees on leave of absence could not receive. *Borges v. Art Steel Co.,* 246 F.2d 735, 738 (2d Cir. 1957); *Dougherty v. General Motors Corp.,* 176 F.2d 561 (3d Cir. 1949). In the case at hand, the labor agreement represents the railroads "established rules and practices relating to employees on furlough or leave of absence. . . ."

Under the terms of the labor agreement, if an employee rendered fewer than 110 days of compensated service in the year preceding because he was on leave of absence, he would not be entitled to a paid vacation. The agreement contained no provision which would excuse a returning veteran from satisfying this requirement. In order to receive a paid vacation in 1965 and 1966, therefore, Dugger was required to render 110 days of compensated service in 1964 and 1965, respectively.

It is undisputed that Dugger did not work 110 days either in 1964 or 1965. As a matter of law, therefore, plaintiff was not entitled to a paid vacation in 1965 and 1966. This interpretation places veterans and non-veteran employees on a parity, as required by the Act; to make an exception for returning veterans would be to discriminate against non-returning veterans.

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construction the courts were giving section 459 (c)(1). Had Congress intended the language of subsection (g) (4) to apply to subsection (c) (1), it could have specifically so provided. Compare Commissioner v. Reynolds, 313 U.S. 428, 432 (1941); Sherman v. Hamilton, 295 F.2d 516 (1st Cir. 1961), *cert. denied,* 369 U.S. 820 (1962).

Plaintiff's argument that the Act does not forbid such discrimination undoubtedly is correct, but this labor agreement did not so provide. Defendant's employees or elected officials [128] could have bargained to have such an exception included in the labor agreement. This, however, was not done, and Congress did not intend to take the employees' position at the bargaining table. The courts also have been careful not to invade the sanctity of labor-management relations. See *John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543 (1964); *Trailmobile Co. v. Whirls,* 331 U.S. 40, 59, 61 (1947).

There is no genuine issue as to any material fact, and defendant is entitled to a judgment as a matter of law.

NOW, THEREFORE, IT IS HEREBY ORDERED

(a) that defendant's motion for summary judgment is granted;

(b) that the cause is hereby dismissed; and

(c) that each party shall bear and pay its costs incurred herein.

The Clerk shall file this Memorandum and Order, which is a final judgment, and mail true and correct copies to counsel of record.

DONE this 20th day of November, 1967.

JAMES NOEL
United States District Judge

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RICHARD L. DUGGER,

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v.

MISSOURI PACIFIC RAILROAD CO.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

QUESTION PRESENTED

Whether a veteran, who is re-employed after an absence of more than two years, must be given, in the year of his re-employment and in the following year, paid vacations he did not earn, when the applicable Vacation System does not provide for anyone to get a paid vacation unless he had earned it by rendering compensated service on a specified number of days in the preceding year.

STATUTES INVOLVED

This case involves the re-employment rights of veterans. Formerly those rights were provided by Section 8 of the Selective Service Act of 1940 (Ch. 720, Sept. 16, 1940, 54 Stat. 890, as amended), and were codified in Title 50 Appendix, U. S. Code, as Sec. 308. Provisions which were to all intents and purposes the same (See U. S. Code Congressional Service, Legislative History, 1948, pages 2003, 2016; and footnote number 1 in the *Accardi Case*, 383 US 226) were re-enacted as Section 9 of the Selective Service Act of 1948 (Public Law 759, Chapter 625, June 24, 1948, 62 Stat. 614, as amended) and were codified in Title 50 Appendix, U. S. Code, as Sec. 459). The 1948 Act has been amended many times, but the portions of the statutory language which are actually involved in this case have not been changed. The name of the Act was changed, in 1951, to the Universal Military Training and Service Act (Public Law 51, Chapter 144, June 19, 1951, 65 Stat. 75), and, in 1967, to the Military Selective Service Act of 1967 (Public Law 90-40, June 30, 1967, 81 Stat. 100); but the manner of its codification remains unchanged. In this brief this statute is sometimes called Section 9 of the Universal Military Training and Service Act, because it was generally designated in that manner in the District Court.

Pertinent portions of Section 9 of the Act are reproduced in Appendix II of this Brief, and designated therein as Section 459 of the Appendix to Title 50. In view of the fact that Petitioner cited Section 459 (g) (4), that provision is included in the portions of Section 459 which are reproduced in Appendix II. That provision was enacted by Public Law 86-632, July 12, 1960, 74 Stat. 467, and was amended in 1961 in a way that is not material to this case.

Other statutory provisions involved, and reproduced in Appendix III hereto, are Sections 5551, 5552, 6302 (a) and (b), and 6303 (a) of Title 5 of the U. S. Code (Public Law 89-544, Sept. 6, 1966, 80 Stat. 488, 489, 517, 518).

STATEMENT OF THE CASE

The U. S. Attorney filed and prosecuted this suit for Petitioner in the U. S. District Court for the Southern District of Texas pursuant to Section 459 (d) of the Appendix to Title 50 of the U. S. Code, which required him to do so—

> "if reasonably satisfied that the person so applying is entitled to such benefits;"

and that Section was the basis for federal jurisdiction in the court of the first instance. (R. 1 to 6) However, the Court of Appeals, on June 7, 1968, granted the U. S. Attorney's Motion, served on June 6, that he be relieved as Counsel for Petitioner—

> "for the reason that the Solicitor General has determined that the Department of Justice will no longer represent the Appellant."

From this it may be inferred that the Department of Justice, after further study, determined that Petitioner was NOT entitled to the benefits for which he sues in this case.

The District Court (276 F. Supp. 496) and the Court of Appeals (403 F. 2nd 719) both held that Petitioner was not entitled to the benefits for which he sues.

What Petitioner is suing for is additional pay, under a Vacation System that was created by a collective bargaining agreement. Controlling provisions of that agreement, taken from Exhibit A (R. 34-39) are set forth in Appendix I to this Brief. The facts were all proved by Petitioner's own admissions, in his complaint (R. 1-4) and by his answers (R. 154, 155) to the Respondent Railroad's Request for Admissions (R. 19-33).

Petitioner began working for the Railroad on May 14, 1962 (R. 20) and worked through July 26, 1963, when he left to enter military service. (R. 24). The applicable collective bargaining agreement provided, then and thereafter, that an employee would receive a paid vacation in any given year only if he had rendered compensated service on a stipulated number of days in the previous year. (R. 21 to 23). That agreement expressly provided that such a paid vacation was "considered to have been earned" by the rendering of that compensated service in the previous year, and that the employee, or his next-of-kin or estate, would be entitled to collect the pay for such a vacation if his employment status terminated, or he died, without receiving the paid vacation. (R.38,39).

Petitioner rendered compensated service for the Railroad on 155 days in 1962, and thereby earned a one-week paid vacation in 1963, under the terms of the collective bargaining agreement. (R. 24). The Railroad paid him for that vacation in 1963, after he had left his position to enter military service. (R. 25).

He rendered compensated service for the Railroad on 138 days in 1963, and thereby earned a one-week paid vacation in 1964, under the terms of the collective bargaining agreement. (R. 24). The Railroad paid him for that vacation in 1964, while he was absent in military service. (R. 25).

Petitioner entered military service on August 11, 1963 (R. 154), and was relieved on July 31, 1965 (R. 26); but he had discontinued working for the Railroad on July 26, 1963 (R. 24), and he did not return to work for the Railroad until September 1, 1965 (R. 26). He did not report back to the Railroad until August 27, 1965, and he was re-employed promptly when he did so. (R. 26). While he was in the armed

forces he earned leave with pay from the Armed Forces at the rate of 2½ calendar days for each month of active military service, and he took some of that as leave with pay while he was in military service; but, at the time of his release from military service, he received from the Armed Forces a lump sum payment for fourteen days of leave which he had earned but not taken while in military service. (R. 27)

Petitioner rendered no compensated service for the Railroad in 1964, and thus did not earn a vaction for 1965 under the terms of the collective bargaining agreement. (R. 25, 26). He rendered no compensated service for the railroad in 1965 prior to September 1. During 1965 he rendered compensated service for the Railroad on only 85 days, and thus he did not earn a paid vacation for 1966 under the terms of the collective bargaining agreement. (R. 13, 27, 28).

Petitioner was restored to the Railroad's service in 1965 without loss of seniority. (R. 32). He was restored to the position he had left, or to a position of like seniority, status and pay, and with the same seniority date of May 14, 1962, that he had held in 1963 when he left for military service. (R.26). Since his re-employment, the Railroad has permitted him to participate in insurance and other benefits on terms which are at least as favorable to him as those which were provided by established rules and practices relating to employees on furlough or leave of absence on August 12, 1963 (R. 32). He does not claim that the Railroad has failed to comply with the Universal Military Training and Service Act with respect to his seniority, nor with respect to his assignment to a position, nor with respect to the wages paid to him for the work performed by him, nor with respect to his status as a Machinist Apprentice working temporarily as a Machinist. (R. 32, 33).

His only claim in this action is that he should have been treated, in regard to qualification for vacations in 1965 and 1966, as if he had been rendering compensated service for the Railroad during the period of his absence in military service from 1963 to 1965. (R. 33). Employees of the United States Government, in the same circumstances, are not treated and paid as if they had been accruing and accumulating annual leave with pay as Government employees, during such a 2-year period of absence for military service. (R. 31). Petitioner did not receive any less pay from the Railroad in 1965 than he would have received if the Railroad had allowed him a vacation with pay in 1965. Neither did he receive any less pay from the Railroad in 1966 than he would have received if the Railroad had allowed him a vacation with pay in 1966. (R. 31).

The applicable collective bargaining agreement has provided for paid vacations ever since 1941, but modifications, making this Vacation System more favorable to the employees, have been negotiated from time to time since then. (R. 21 to 23, 27, 35 to 41, 42 to 47, 50 to 151).

In 1953, the employees had proposed a number of changes, one of which was a rule in the collective bargaining agreement which would have provided that:

> " * * * If an employee shall return to the service of a carrier after having served in such armed forces, with seniority rights maintained or restored, he shall be entitled to a vacation in the year during which he thus returns and in the next succeeding year, equal to what he would have been given had he been in the compensated service of the carrier during the preceding year and in the year he returns the same length of time he was in such armed forces, plus whatever time he may have been in the compensated service of the carrier in such years. * * * " (R. 96, 97)

However, Emergency Board No. 106, appointed under the Railway Labor Act by President Eisenhower in Executive Order

10511 dated December 28, 1953, had recommended, in its Report dated May 15, 1954, that that proposal be withdrawn. (R. 104). That proposal never became a part of the applicable agreement.

Again in 1959 the employees had proposed a number of changes, one of which was a rule in the agreement which would have provided that:

> "(b) Such employee must be granted a vacation in the year in which he returns to the service of the carrier if he returns on or before September 1. "Return to service" includes "reporting and being available for work," whether or not work is available.
>
> "(c) Time spent in the Armed Forces must be counted as days of compensated service in determining whether the employee is entitled, under the minimum working requirements, to a vacation in the year following his return to the service of the carrier." (R. 144)

However, Emergency Board No. 130, appointed by President Eisenhower in Executive Order 10875 dated April 22, 1960, in its Report dated June 8, 1960, made adverse comments on that proposal, including the following:

> "The employment rights of returning veterans are protected by the Universal Military Training and Service Act; it is not contended that the vacation practices now in effect in the railroad industry violate any provisions of that statute. Members of the Armed Forces also accumulate vacation credits under the provisions of the Armed Forces Leave Act, at the rate of 2½ days a month, or 30 days a year. Consequently, in the year in which the serviceman leaves the Armed Forces he obtains terminal leave under the provisions of that statute." (R. 144)
>
> "* * * They [the Carriers] point out, further, that the portions of the Organizations' proposal summarized in paragraphs (b) and (c) above would make it possible for the returning serviceman to receive a vacation for the calendar year in which he reported himself available for

> work, even though no work was available, and to receive a vacation for the following year, even though he had performed no compensated service for the carrier since his return from the Armed Forces. Thus, it would be theoretically possible, under the Organizations' proposal, for an employee to claim a week's paid vacation in 1960 and 1961 if he performed compensated service on 1 day in each of 4 separate months, not necessarily consecutive, in 1958, entered the armed services any time in 1958, and reported back to the carrier as available to work on or before September 1, 1960, even [83] though no work was available to him at that time or subsequently in 1960. (Tr. 2032)" (R. 145, 146)

Emergency Board 130 recommended

> "no changes in the present vacation rules with respect to employees returning from military service" (R. 111);

because it said:

> "The present rules in the railroad industry regarding vacation allowances to returning servicemen are reasonable, and the interests of the employees involved are further protected by applicable federal statutes. * * * The Board believes that the proposals of the Organizations on this issue go substantially beyond the practices of which they complain and are not in the best interests of the collective bargaining relationship." (R. 118)

Those proposals were never adopted and were not in the applicable collective bargaining agreement with respect to vacations. (See Exhibit A, R. 35 to 41).

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

Summary of the Argument

The decision in this case is not in conflict with prior decisions of this Court, as claimed. Instead, it follows prior decisions, by other courts of Appeal, in which this Court has denied petitions for certiorari. The statute in this case requires the same treatment for employees of the federal government as for employees of the railroad. By arranging the Vacation

System for federal employees so that they do not receive the benefit Petitioner claims, Congress has shown that it did not intend that Petitioner should receive it either.

1. The decision in this case does not conflict with the decision of this Court in *Accardi v. Pennsylvania R. Co.*, 383 US 225 (1966), as Petitioner suggests; because nothing, to which Petitioner was restored when he was re-employed, has been taken from him.

Accardi, and five other tugboat firemen, established seniority as such in 1941 and 1942, but were absent in military service for periods of three years or more during World War II, and then were re-employed in 1946, under the Selective Service Act. In the language which this Court used in *Oakley v. Louisville & N. R. Co.*, 338 US 278 (1949), each one of them assumed

> "upon his re-employment, the seniority he would have had if he had remained in his civilian employment. His seniority status secured by this statutory wording continues beyond the first year of his re-employment, subject to the advantages and limitations applicable to the other employees." (P.284)

The only purpose or use for the seniority rights, to which each of those firemen was restored, was to enable him to have as good a claim, on *future work opportunities*, as any non-veteran who had been hired at the same time, and had NOT left that employment to perform military service. In the competition for *future work opportunities* priority as between eligible employees was based on seniority.

In 1960, when the transition from steam power to diesel power caused a big reduction in the number of jobs available for these men, a collective bargaining agreement terminated the employment and seniority of all of those who had been hired

since 1940, and gave them a separation allowance instead. That separation allowance was intended to be compensation for the loss of *future work opportunities.* The value of those lost opportunities varied among those men in accordance with the amount of seniority held by them, rather than in accordance with the number of days they had worked for the company during World War II. In the case of those who were veterans, that seniority included credit for significant segments of time they had spent in military service, when others were working for the company. However, the company and the union agreed to compute the separation allowances in 1961, on the basis of the amount of compensated service those men had had in the past. The effect of doing that was to discriminate against the FUTURE rights of veterans, because of their PAST absence in military service, by paying more to the non-veteran than to the veteran for the loss of the SAME amount of seniority. In short, that agreement attempted to take from Accardi and his fellow veterans, in 1960, the entire value of the very increments of seniority which had been restored to them in 1946 under the Selective Service Act.

And that was the context in which this Court said:

> The use of the label 'compensated service' cannot obscure the fact that the real nature of these payments was compensation for loss of jobs. And the cost to an employee of losing his job is not measured by how much work he did in the past—no matter how calculated—but by the rights and benefits he forfeits by giving up his job. Among employees who worked at the same jobs in the same craft and class the number and value of the rights and benefits increase in proportion to the amount of seniority, and it is only natural that those with the most seniority should receive the highest allowance since they were giving up more rights and benefits than those with less seniority. The requirements of the 1940 Act are not satisfied by

giving returning veterans seniority in some general abstract sense and then denying them the perquisites and benefits that flow from it. We think it clear that the amount of these allowances is just as much a perquisite of seniority as the more traditional benefits such as work preference and order of lay-off and recall. We hold that the failure to credit petitioners' 'compensated service' time with the period spent in the armed services does not accord petitioners the right to be reinstated 'without loss of seniority' guaranteed by §§ 8 (b) (B) and (c)." (p. 721).

"* * *

"We affirm the judgment of the District Court holding that petitioners are entitled to recover from the railroad the stipulated damages due them because they are entitled to credit for the full amount of time served in the armed forces in calculating their severance pay. * * *" (p.723).

The *Accardi Case* does not resemble this one in any real way, because, ever since his re-employment, Petitioner's rights and opportunities in respect to the earning of future paid vacations have been the same as those of any non-veteran with the same seniority. The prior service of a railroad employee is used, under this agreement, in much the same way that the prior service of an employee of the federal government is used in computing annual leave under *5 US Code Sec. 6303,* to determine how much vacation an employee can earn, and how much work he must do to earn it. However, under both systems, the right to a paid vacation or annual leave is not an automatic attribute of status or seniority, but must be earned by specific amounts of actual compensated service.

In the present case, the District Court was well aware of the existence and significance of the *Accardi Case,* and of the distinction between that case and this one. In Note 6 to the opinion, the Court pointed out that this labor agreement "provided for the *Accardi* situation." (R. 164) This is a

reference to the fact that Section 1 (g) of the 1960 Agreement (R. 37, 38) and Section 1 (h) of the 1965 Agreement (R.45), both provided that, in circumstances like those of Petitioner:

> "* * * the time spent by such employees in the Armed Forces will be credited as qualifying service in determining the length of vacations for which they qualify upon their return to the service of the employing carrier."

To the extent that a requirement of a certain amount of compensated service, in each year of Petitioner's prior continuous service, is a factor prospectively, in determining how much work he must do, in any given year, to earn a vacation in the next year, or in determining how many weeks of vacation he will get when he does earn a vacation, Petitioner, by the terms of this agreement, is treated as if he had been working for the railroad while he was actually in military service.

In respect to any vacation which he earns after his military service, it is undisputed that Petitioner is already enjoying, under this agreement, the right to have his future opportunities and earnings not be impaired by reason of his past absence in military service from 1963 to 1965. The value of the seniority that Accardi was giving up, in return for his separation allowance, had been enhanced by the same kind of right; and the *Accardi Case* said that the increment of value, which was derived from that enhancement, could not be taken away from him in that manner in the computation of his separation allowance. But claimant Dugger has had that right all the time, and no one proposes to take it away from him.

Presumably the Department of Justice recognizes that the decision in this case is not in conflict with this Court's decision in the *Accardi Case*, or else it would have continued to prosecute this case, as it did the *Accardi Case*. (See footnote 2, 383 U.S. 230.)

2. The decision in this case does not conflict with the decision of this Court in *Eager v. Magma Copper Co.*, 389 US 323 (1967), as Petitioner suggests; because Petitioner has already received what Eager was suing for, and Eager did not claim what Petitioner is suing for.

Eager went to work for Magma Copper on March 12, 1958, and left for military service nearly a year later, on March 6, 1959. After being absent more than three years, be reason of military service, he returned to work on May 2, 1962.

One thing Eager was claiming, and recovered, was holiday pay for May 30 and July 4, 1962. The purposes and principles in regard to holidays differ significantly from those in regard to vacations, as was clearly indicated by Emergency Board 106 in its discussion (R. 99-101) and recommendations (R. 105-106), which gave rise to the holiday provisions in the agreement in this case. For example, while holiday pay is not regarded as having been earned by some specific prior work so as to be payable even if the employee died before the holiday occurred, it does presuppose a particular STATUS, as a more or less regular employee who has a regular amount of pay. As the Board pointed out,

> "for most of the employees concerned, the holidays in question are recognized by no compensation is received" (R.99);

and the declared purpose of the Board, in recommending holiday pay, was to make

> "it possible for the employees to maintain their normal take-home pay in weeks during which a holiday occurs." (R. 100)

No one ever suggested that Petitioner failed to collect holiday pay for Labor Day in 1965, which fell on September 6, 1965,

the very next week after he resumed work. Moreover, it is evident, from the agreement provisions reproduced in Exhibit A (R. 34, 35), that, even if he had failed to collect holiday pay for Labor Day in 1965, his prior absence in military service could not have been the cause. As we have already seen, he admits that, except for the vacation benefits in question, he did receive the treatment, pay and benefits provided by the agreement (R. 29, 154), and was restored without loss of seniority (R. 32). He does not claim that the Railroad failed to comply with the Act with respect to his status or seniority or wages, but only in regard to vacation benefits (R. 32,33).

The other thing that Eager was claiming was pay for the 1959 vacation, which he had missed *before entering military service*, because he had left his job before his full year was up. It is shown in the opinion by the Court of Appeals in that case, at 380 F 2nd 320, that the collective bargaining agreement, which created the Vacation System in effect for employees of that Company, said:

> "9-8 Vacations B. Requirements to qualify. An employee who has been continuously employed by the company for at least one (1) year immediately preceding the date of his application for vacation and who has not had a vacation within said year and who has worked at least 75% of his available shifts within said year and who is an employee of the company on the day his vacation commences shall be entitled to a vacation with pay as hereinafter set forth."

There was no dispute about the fact that Eager had worked 75% of the shifts available during his vacation-earning year, which began on March 12, 1958, and ended on March 11, 1959. Magma Copper Company denied him the vacation pay because

> "He was not in the service of the Company at the end of his vacation-earning year as required by the contract."

The Supreme Court held in effect that he was entitled to the vacation pay, which he had already earned in full, and which he would automatically have collected if he had not entered the military service.

The vacation pay that Eagar collected in that case is not analogous to the vacation pay that Petitioner is suing for here. The analogue, in this case, to the vacation pay that Eagar collected by his suit, is the pay for the two vacations (1963 and 1964), which Petitioner had earned by work he performed (in 1962 and 1963), before he left for military service. But, as we have already seen Petitioner admits that the pay for one of them (1963), was allocated to the next week after he left, and that he received it right away; and that the pay for the other one (1964) was sent to him in January of 1964, while he was still in military service. (R. 24,25).

Eagar's case would be comparable to this one, if Eagar had been suing Magma Copper Company for the pay for the THREE vacations which he failed to earn, from March 12, 1959, to March 11, 1962, because he was absent in military service, but which he would have earned, if he had been at work instead of being absent in military service during that period. Nobody claimed that Eagar was entitled to collect anything like that; but that is what Petitioner is seeking in this case.

Actually what was new in the *Magma Copper Company Case*, was the fact that it arose under the Universal Military Training and Service Act, rather than the Selective Service Act of 1940; The final decision in that case was very similar to the one reached, on comparable fact, in the case of *McLaughlin v. Union Switch & Signal Co.*, 70 F. Supp. 744, 72 F. Supp. 284 (W. D. Pa., 1947); reversed, 166 F. 2d 46 (3rd Cir., 1948). The *McLaughlin Case* is especially interesting because it involved

claims comparable to Eagar's, and it also involved claims comparable to the ones made by Petitioner in the present case. In the *McLaughlin Case*, the trial court denied both kinds of claims. However, the Court of Appeals held that, on the basis of the contracts involved in that particular case, the claims like Eagar's, for vacations earned before military service, were valid; but that the claims like Petitioner's, for vacations which he failed to earn by reason of his absence in military service, were NOT valid.

Furthermore, Eagar's case, like Arcardi, was a plain case of unfair, and even hostile, discrimination against veterans as such. The labor agreement in effect in his case undertook to give to veterans, because of the fact that they had left to enter military service, worse treatment than they would have received, if they had left by reason of being furloughed, or laid off in a reduction of the force. This is apparent from the provision from Magma Copper's labor agreement, which appears on page 320 of the opinion in 380 F. 2d, as follows:

> "E. * * * (7) Any employee leaving the service of the Company for any reason (except lay off due to reduction of work force) before his annual determination date shall not be entitled to a vacation or vacation pay in lieu thereof * * *"

Here, again, it should be noted that the Department of Justice did successfully represent Eagar in this Court, and presumably would not have declined to represent Petitioner in the present case if there were any conflict between the two decisions.

3. The decision in this case is in accordance with decisions by other Courts of Appeals, in cases in which this Court has denied petitions for certiorari.

After the Court of Appeals for the Second Circuit had denied claims comparable to the present one in three cases in 1948

(*McLaughlin v. Union Switch & Signal Co.*, 166 F. 2nd 46; *Siaskiewicz v. General Electric Co.*, 166 F 2nd 463; and *Dwyer V. Crosby Co.*, 167 F 2nd 567), the Court of Appeals for the Sixth Circuit denied one in 1950 (*Brown v. Watt Car & Wheel Co.*, 182 F 2nd 570). and this Court denied a petition for certiorari in that case in 1950 (340 US 875).

Meanwhile a very interesting series of cases had started. It arose out of the collective bargaining agreement that General Motors Corporation made on March 13, 1946, after a long strike which began late in November of 1945.

Prior to 1946, the collective bargaining agreement that General Motors had in effect provided that an employee would qualify to receive a vacation allowance at the end of June, if he had worked for the Company a year, and was still on the payroll at the end of the year. If he did qualify to receive a vacation allowance, the amount he would receive would be determined by his seniority.

However, after this long strike, the agreement was changed to add a new requirement, which was that each employee also had to have made a certain amount of gross earnings in the year 1945, before he could qualify for a vacation allowance in 1966.

The pace of demobilization was such that there were a great many men, who had been employed by General Motors before entering military service, and who were absent in military service throughout 1945, but who had been restored to service with General Motors by July 1, 1946. Under the old vacation system, all or most of these veterans would have received a vacation allowance in 1946 shortly after being restored to their pre-war jobs; but, under the revised system, they did not earn a vacation allowance for 1946 because they had no earnings in 1945.

In 1949, the Court of Appeals for the Third Circuit denied the claim of one of these veterans, in *Dougherty v. General Motors Corp.*, 176 F. 2d 561, saying:

> "It is clear, therefore, that the 1946 vacation pay provisions cannot be declared illegal as to Dougherty simply because their effect is to deny him – and any other General Motors employee, veteran or non-veteran, who had no 1945 gross earnings – 1946 vacation pay. When we recall that vacation pay is calculated to grant relief from, and compensation for, work already performed, we cannot deem a provision unreasonable which bases the computation of benefits upon that factor and which has no anti-veteran objective. See Siaskiewicz v. General Electric Co., 2 Cir., 1948, 166 F. 2d 463, and Dwyer v. Crosby Co., 2 Cir., 1948, 167 F. 2d 567. However desirable and feasible some modification of the provision by the parties themselves might have been, we cannot impose as a legal requirement a vacation provision other than that on which the bargainers agreed, as long as the intent and operation do not place veterans in a position inferior to that of non-veterans on leave of absence." (p. 563, 564).

Certiorari was denied in 1950 (338 US 956).

In 1951, the Court of Appeals for the Seventh Circuit denied the claims of three more, in *Foster v. General Motors Corp.*, 191 F. 2d 907; and this Court denied a petition for a writ of certiorari in the latter case, in 1952 (343 US 906, 937). In this latter case, the Court of Appeals said:

> "Thus, it appears settled that vacation pay is not a right guaranteed to a returning veteran by the Act. Such right, if he has any, is determinable in accordance with the terms of a collective bargaining agreement. We think this would not be disputed by the plaintiffs; in fact, it is conceded that the 1946 agreement on its face precludes recovery. However, it is argued that such agreement was not made in good faith and that in operation and effect it discriminated against returning veterans. This argument appears to be predicated mainly upon the provision which makes the earnings for 1945 the basis for vacation payments, and

inasmuch as plaintiffs had no earnings for that year any basis upon which they might calculate vacation pay for 1946 was eliminated. It should be noted, however, that this provision applied with equal force to all employees who were on a furlough or leave of absence, whether they were veterans or non-veterans. Vacation pay, so far as we are aware, is not an incident to employment but is a right which flows entirely from an agreement between the employer and the employees or the union as their representative. Not only does the 1946 agreement fail to provide vacation pay for those on a furlough or leave of absence, but the same is true as to each of the agreements previously or subsequently entered into between defendant and the union, including the 1942 agreement, the year plaintiffs were inducted into military service." (p. 910,911).

But this was not the end of the controversy at General Motors over 1946 vacations. A man named Alvado, suing for himself and on behalf of others similarly situated, contended that the change in the agreement was made in bad faith, with the intent to discriminate against veterans as a class and injure them. The Court of Appeals for the Second Circuit, in 1956, said that:

"... If the sole evidence of discrimination were the agreement itself, we would feel constrained by the precedents to affirm the summary judgment. But here plaintiff alleged that defendant intended, by means of the agreement, to discriminate against veterans for its own financial gain. Such an allegation of 'bad faith' states a good cause of action under .308(c), and plaintiff must therefore be given the opportunity at a trial to produce evidence, in addition to the agreement, in support of that allegation.

"In Aeronautical Indus. Dist. Lodge v. Campbell, 337 U. S. 521, 69 S. Ct. 1287, 1291, 93 L. Ed. 1513, the Court significantly ended its opinion thus: 'All this presupposes, obviously, that an agreement containing the 1945 provisions expresses honest desires for the protection of the interest of all members of the union and is not a skilled device of hostility to veterans. ...' (p. 411).

This was *Alvado v. General Motors*, 229 F. 2d 408 (Cer. Den., 1956, 351 U. S. 983).

On remand, after a full trial, the District Court again held against the plaintiff, in an opinion which gives an excellent discussion of the motives and considerations involved in creating a vacation system. (See 194 F. Supp. 314). This decision was upheld by the Court of Appeals for the Second Circuit in 1962 (See 303 F. 2d 718); and this Court, as late as 1967, refused to disturb it (See 387 US 915). The majority of the Court of Appeals said:

> "If knowledge of the result alone were sufficient to establish the requisite intent this court's action in returning the case for trial would have been without point, and the court would not have held, as it did, that the plaintiff was not entitled to summary judgment. For the knowledge of the defendant that the agreement would have the effect on veterans which it did have was clearly inferable from the material then available, and was not denied by the defendant.
>
> "In order to establish a violation of the Act the veteran must show, in addition to knowledge, that there was a purpose or motive to discriminate. In the Supreme Court cases in which disadvantage to veterans was held not to constitute a violation of the Act, there was no doubt that the defendants knew that such a disadvantage would be the result of their arrangements. Ford Motor Co. v. Huffman, 345 U. S. 330, 73 S. Ct. 681, 97 L. Ed. 1048 (1953); Aeronautical Indus. Dist. Lodge 727 v. Campbell, 337 U. S. 521, 69 S. Ct. 1287, 93 L. Ed. 1513 (1949). What was missing was proof of 'hostility to veterans,' see 337 U. S. at p. 529, 69 S. Ct. 1287, proof that the arrangements were not made in 'good faith' and with 'honesty of purpose.' See 345 U. S. at p. 338, 73 S. Ct. 681.
>
> "In order to establish that the motive was not hostile discrimination against veterans, in bad faith and with dishonesty of purpose, it is proper to show what the

motive was. In the present case the lower court found, with ample support in the evidence, that the defendant's motive was "to end the strike * * *; to begin post-war production with the same advantages as defendant's competitors; to provide work for the striking employees, those laid off and returning veterans; and, lastly, *a justified belief that vacation allowance was* not a gratuity but rather *compensation for work performed* and, for this reason, a belief that defendant was justified in reducing vacation allowance by a portion of the strike period.' " (p. 721, 722). (Emphasis added.)

It is interesting to note that, even the dissenting judge in that case would deny a claim like Petitioner's. In his dissent, Judge Lumbard said:

"* * * Provisions which are not at all uncommon, see Aeronautical Ind'l Dist. Lodge 727 v. Campbell, supra, 337 U. S. at 528, 69 S. Ct. 1287, 93 L. Ed. 1513, such as the computation of vacation pay on the basis of the amount of work rendered, should not be struck down. This court has expressly held that vacation pay is an incident of actual work and that veterans need not be treated as if they had been at work while in military service. Siaskiewicz v. General Electric Co., 166 F. 2d 463 (2 Cir. 1948); Dwyer v. Crosby, 167 F. 2d 567 (2 Cir. 1948). Therefore, a GM contract to pay an employee, veteran or non-veteran, a percentage of his earnings during the fiscal year 1946 would have been valid. Such an agreement would not have discriminated against veterans any more than GM's refusal to give vacation pay to veterans during fiscal 1944 or 1945 while they were in military service the entire year. * * * " (p. 724).

The National Vacation Agreements in the railroad industry were created under the auspices of the federal government, largely on the basis of public arbitration and the recommendations of emergency boards appointed by the President of the United States, under the provisions of the Railway Labor Act. Under these agreements we have an established Vacation System which represents a genuine concerted public effort to deal fairly with everyone concerned.

Exhibits D-1 for 1942, and D-2 for 1954, and D-3 for 1960, are conclusive proof, from public records, of the considerations which influenced the formation of the provisions we are concerned with in this case.

No one has contended in this case, and there would be no basis on which anyone could reasonably contend, that the Vacation System on the railroad was adopted for the purpose of unfairly discriminating against veterans. After all, Petitioner was absent from the railroad for more than two years, and he only failed to get from the railroad two paid vacations. During the two years that he was gone, he qualified for and received pay, and paid vacations, under the laws enacted by Congress to govern members of the armed forces, including annual leave at the rate of 2½ calendar days for each month of active service, in accordance with law. It does not seem any less reasonable for him to fail to receive from the railroad the two paid vacations that he did not earn, than for him to fail to collect from the railroad the wages that he did not earn during the two year period of his absence. In fact, as he himself admits, he has not even suffered any monetary loss in this respect; for he would not have made any more money, even if he had had the two paid vacations for which he is suing. (R. 31). He would merely have had additional time off the job, while receiving the same amount of pay.

4. The question presented here does NOT involve Section 9 (g) (4), as Petitioner suggests. Instead, it involves the "sense-of-the-Congress" provision of Section 9 (c) (2); and the decision in this case is in accordance with "the sense of the Congress," as that sense has been expressed in subsequent legislation applying to government employees.

It was never contended in this case that Petitioner requested a leave of absence, or was granted a leave of absence; nor that

the reason for his absence was "active duty for training," or "inactive duty training" in the Armed Forces of the United States. It is undisputed that he was in fact absent for longer than the period which would have been required to perform active duty for training or inactive duty training. Furthermore, it is undisputed that he did not report for work at the beginning of his next regularly scheduled working period after the expiration of the last calendar day necessary to travel to the place of employment following his release from military service. It was never contended that his return was delayed due to factors beyond his control. In short, the facts of this case do not correspond, in any detail, to the facts of the type of case to which Subsection (g) (4) of Section 9 of the Act applies. Section 9 (g) (4) originated as Public Law 86-632, 74 Stat. 467, approved July 12, 1960; and, according to the Senate Report, reprinted at page 3077 of the U. S. Code Congressional and Administrative News for 1960, its purpose was

> " * * * to adjust the time period within which leave of absence rights must be asserted after the performance of inactive duty for training, active duty for training other than an initial period of 6 months of active duty for training, and after being examined for induction." (p. 3077)
>
> "This section was designed to provide reemployment protection for trainees who are absent from employment for only a short period of time, such as 2-hour drills, weekend drills, 2-week annual encampments, and special training or instruction periods that may last for 30, 60, or 90 days.
>
> "A period of 30 days within which to assert leave of absence rights by persons performing inactive duty training such as an armory drill of 2 hours is unrealistic. The amended bill proposes substitution of new provisions requiring that persons covered by this section shall upon request be granted a leave of absence * * * " (P. 3078)

"The committee has added language intended to assure that persons who must perform active duty for training or inactive duty training will not be required to forgo vacations to which they otherwise would be entitled." (P. 3079)

It seems reasonably clear that the requirement, in Subsection (g) (4), that such an employee as was covered by that provision—

"* * * shall be permitted to return to such position with such vacation as he would have had if he had not been absent for that purpose,"

was intended to prevent an employer from requiring a reservist to use his regular vacation for military training, rather than letting him have a leave of absence for that purpose, in addition to his regular vacation. In any event, Subsection (g) (4) has no application here. All that the reference to Subsection (g) (4) really contributes to this case is that it shows that Congress, and the draftsmen of these various acts and amendments, were and are aware of the existence of paid vacations, and could, and presumably would, have made provisions to guarantee them, in cases like this one, if it had been their intention to have them guaranteed.

On the other hand, Subsection (b) of Section 9 is the one that says that the veteran is to be restored to the position he left, or to a position of like seniority, status and pay. Subsection (b) (A) (i) says it in regard to employees of the United States Government; and Subsection (b) (B) (i) says it in regard to employees like Petitioner, of a private employer, like the railroad. But the language with which they say it is word for word the same, so far as concerns the circumstances in this case. Both parts of Subsection (c) of Section 9 lump both kinds of restored veterans together, and deal with them simultaneously,

using the same language. Thus Subsection (c) (1) and (c) (2) each require exactly the same treatment for a vereran in Petitioner's circumstances, whether he is an employee of this railroad, or an employee of the United States Government.

The Vacation System for employees of the United States Government is the system by which annual leave is accrued, and allowed or paid for. The System in effect at the present time is not especially different, so far as the circumstances of this case are concerned, from the way it worked in 1948, when the Selective Service Act of 1948 and Section 9 (c) (2) were enacted, nor from the way it worked in 1965, when Petitioner returned from military service; but at those earlier times it was the result of a patchwork of statutes, which were all rewritten and recodified into a revised Title 5 of the U. S. Code by Public Law 89-554, 80 Stat. 378, approved September 6, 1966. For convenient reference, we cite the provisions of the current codification, but, in general, the same provisions were already in effect on all earlier dates here involved, under prior laws.

It will be noted immediately from Sections 6302 and 6303, Title 5, that a federal employee must earn each segment of his paid vacation (or accrue his annual leave) by being actually employed every work day during a full bi-weekly pay period; but that the length of the vacation he earns in this manner (or the number or hours or days of annual leave he accrues) varies in accordance with the number of years of service he has had. Under Sections 5551 and 5552 of Title 5, when a federal employee enters military service, he can either collect the vacation pay he has already earned, or leave it to his credit until he returns. There is no provision for him to earn any, or to be treated as if he had earned any, while he is actually absent from his federal job and in military service in circumstances like those

in this case. And, as we have already seen, Petitioner admits (R. 32, 155) that employees of the federal government, in the same circumstances, do not receive the vacation benefit for which he is suing.

The only available statutory basis for Petitioner's claim in this case is the "sense-of-the-Congress" provision in Section 459 (c) (2); and the Congress itself has construed that provision, with respect to the circumstances of this case, by legislating in such a way that employees of the federal government, to whom it also applies, do not receive the benefit for which the Petitioner sues. As it is shown that the decisions in this case below have been in accordance with Congress's own understanding and application of the meaning of this "sense-of-the- Congress" provision, there is no reason for this Court to concern itself with reviewing this case.

CONCLUSION

For the reasons stated, the Respondent requests that the Petition for a Writ of Certiorari in this case be denied.

Respectfully submitted,

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APPENDIX I

Pertinent Provisions from the Vacation Agreement as Amended in 1960 (Exhibit A, R. 35-39)

Section 1. Article 1 of the Vacation Agreement of December 17, 1941, as amended by the Agreement of August 21, 1954, is hereby amended to read as follows:

(a) Effective with the calendar year 1961, an annual vacation of five (5) consecutive work days with pay will be granted to each employee covered by this Agreement who renders compensated service on not less than one hundred twenty (120) days during the preceding calendar year.

(b) Effective with the calendar year 1961, an annual vacation of ten (10) consecutive work days with pay will be granted to each employee covered by this Agreement who renders compensated service on not less than one hundred ten (110) days during the preceding calendar year and who has three (3) or more years of continuous service and who, during such period of continuous service renders compensated service on not less than one hundred ten (110) days (133 days in the years 1950-1959 inclusive, 151 days in 1949 and 160 days in each of such years prior to 1949) in each of three (3) of such years, not necessarily consecutive.

(c) Effective with the calendar year 1961, an annual vacation of fifteen (15) consecutive work days with pay will be granted to each employee covered by this Agreement who renders compensated service on not less than one hundred (100) days during the preceding calendar year and who has fifteen (15) or more years of continuous service and who, during such period of continuous service renders compensated service on not less than one hundred (100) days (133 days in the years 1950-1959 inclusive, 151 days in 1949 and 160 days in each of such years prior to 1949) in each of fifteen (15) of such years, not necessarily consecutive.

(d) * * *

(e) * * *

(f) Calendar days in each current qualifying year on which an employee renders no service because of his own sickness or because of his own injury shall be included in computing days of compensated service and years of continuous service for vacation qualifying purposes on the basis of a maximum of ten (10) such days for an employee with less than three (3) years of service; a maximum of twenty (20) such days for an employee with three (3) but less than fifteen (15) years of service; and a maximum of thirty (30) such days for an employee with fifteen (15) or more years of service with the employing carrier.

(g) In instances where employees have performed seven (7) months' service with the employing carrier, or have performed, in a calendar year, service sufficient to qualify them for a vacation in the following calendar year, and subsequently become members of the Armed Forces of the United States, the time spent by such employees in the Armed Forces will be credited as qualifying service in determining the length of vacations for which they may qualify upon their return to the service of the employing carrier.

(h) An employee who is layed off and has no seniority date and no rights to accumulate seniority, who renders compensated service on not less than one hundred twenty (120) days in a calendar year and who returns to service in the following year for the same carrier will be granted the vacation in the year of his return. In the event such an employee does not return to service in the following year for the same carrier he will be compensated in lieu of the vacation he has qualified for provided he files written request therefor to his employing officer, a copy of such request to be furnished to his local or general chairman.

Section 2. Article 8 of the Vacation Agreement of December 17, 1941, as amended by the Agreement of August 21, 1954, is hereby amended, effective September 1, 1960, to read as follows:

The vacation provided for in this Agreement shall be considered to have been earned when the employee has qualified under Article 1 hereof. If an employee's em-

ployment status is terminated for any reason whatsoever, including but not limited to retirement, resignation, discharge, non-compliance with a union-shop agreement, or failure to return after furlough he shall at the time of such termination be granted full vacation pay earned up to the time he leaves the service including pay for vacation earned in the preceding year or years and not yet granted, and the vacation for the succeeding year if the employee has qualified therefor under Article 1. If an employee thus entitled to vacation or vacation pay shall die the vacation pay earned and not received shall be paid to such beneficiary as may have been designated, or in the absence of such designation, the surviving spouse or children or his estate, in that order of preference.

APPENDIX II

Portions of Section 459 of the Appendix to Title 50 of the U. S. Code

§ 459. Separation from service

(a) Certificate recording proficiency and merit; physical examination

Any person inducted into the armed forces under this title (sections 451, 453, 454, 455, 456 and 458-471 of this Appendix) for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 4(b) (section 454(b) of this Appendix) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. In addition, each such person who is inducted into the armed forces under this title (said sections) for training and service shall be given a physical examination at the beginning of such training and service, and upon the completion of his period of training and service under this title (said sections), each such person shall be given another physical examination and, upon his written request, shall be given a statement of physical condition by the Secretary concerned: *Provided*, That such statement shall not contain any reference to mental or other conditions which in the judgment of the Secretary concerned would prove injurious to the physical or mental health of the person to whom it pertains: *Provided further*, That, if upon completion of training and service under this title (said sections), such person continues on active duty without an interruption of more than seventy-two hours as a member of the Armed Forces of the United States, a physical examination

upon completion of such training and service shall not be required unless it is requested by such person, or the medical authorities of the Armed Force concerned determine that the physical examination is warranted.

(b) Reemployment rights

In the case of any such person who, in order to perform such training and service, has left or leaves a position (other than a temporary position) in the employ of any employer and who (1) receives such certificate, and (2) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

(A) if such position was in the employ of the United States Government, its Territories, or possessions, or political subdivisions thereof, or the District of Columbia, such person shall—

(i) if still qualified to perform the duties of such position, be restored to such position or to a position of like seniority, status, and pay; or

(ii) if not qualified to perform the duties of such position by reason of disability sustained during such service but qualified to perform the duties of any other position in the employ of the employer, be restored to such other position the duties of which he is qualified to perform as will provide him like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in his case;

(B) if such position was in the employ of a private employer, such person shall—

(i) if still qualified to perform the duties of such position, be restored by such employer or his successor in interest to such position or to a position of like seniority, status, and pay; or

(ii) if not qualified to perform the duties of such position by reason of disability sustained during such service but qualified to perform the duties of any other position in the employ of such employer or his successor in interest, be restored by such employer or his successor in interest to such other position the duties of which he is qualified to perform as will provide him like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in his case,

unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

(C) if such position was in the employ of any State or political subdivision thereof, it is declared to be the sense of the Congress that such person should –

(i) if still qualified to perform the duties of such position, be restored to such position or to a position of like seniority, status, and pay; or

(ii) if not qualified to perform the duties of such position by reason of disability sustained during such service but qualified to perform the duties of any other position in the employ of the employer, be restored to such other position the duties of which he is qualified to perform as will provide him like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in his case.

(c) Service considered as furlough or leave of absence

(1) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) [of this section] shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was

inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

(2) It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) [of this section] should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.

(3) Any Person who holds a position described in paragraph (A) or (B) of subsection (b) [of this section] shall not be denied retention in employment or any promotion or other incident or advantage of employment because of any obligation as a member of a reserve component of the Armed Forces of the United States.

(d) Jurisdiction of district court; United States attorney to act for claimant

In case any private employer fails or refuses to comply with the provisions of subsection (b), subsection (c) (1), subsection (c) (3) or subsection (g) [of this section], the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, specifically to require such employer to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action: *Provided,* That any such compensation shall be in addition to and shall not be deemed to diminish any of the benefits of such provisions. The court shall order speedy hearing

in any such case and shall advance it on the calendar. Upon application to the United States attorney or comparable official for the district in which such private employer maintains a place of business, by any person claiming to be entitled to the benefits of such provisions, such United States attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof specifically to require such employer to comply with such provisions: *Provided,* That no fees or court costs shall be taxed against any person who may apply for such benefits: *Provided further,* That only the employer shall be deemed a necessary party respondent to any such action.

(e) Reemployment by Federal Government

* * * * *

(f) Priority of rights to reemployment

* * * * *

(g) Reemployment benefits to persons enlisting or called to active duty

(1) Any person who, after entering the employment to which he claims restoration, enlists in the Armed Forces of the United States (other than in a reserve component) shall be entitled upon release from service under honorable conditions to all the reemployment rights and other benefits provided for by this section in the case of persons inducted under the provisions of this title (sections 451, 453, 454, 455, 456 and 458-471 of this Appendix), if the total of his service performed between June 24, 1948, and August 1, 1961, did not exceed four years, and the total of any service, additional or otherwise performed by

him after August 1, 1961, does not exceed five years, provided that the service in excess of four years after August 1, 1961, is at the request and for the convenience of the Federal Government (plus in each case any period of additional service imposed pursuant to law).

(2) (A) Any person who, after entering the employment to which he claims restoration enters upon active duty (other than for the purpose of determining his physical fitness and other than for training), whether or not voluntarily, in the Armed Forces of the United States or the Public Health Service in response to an order or call to active duty shall, upon his relief from active duty under honorable conditions, be entitled to all of the reemployment rights and benefits provided by this section in the case of persons inducted under the provisions of this title [sections 451, 453, 455, 456 and 458–471 of this Appendix], if the total of such active duty performed between June 24, 1948, and August 1, 1961, did not exceed four years, and the total of any such active duty, additional or otherwise, performed after August 1, 1961, does not exceed four years (plus in each case any additional period in which he was unable to obtain orders relieving him from active duty).

(B) Any member of a Reserve component of the Armed Forces of the United States who voluntarily or involuntarily enters upon active duty (other than for the purpose of determining his physical fitness and other than for training) or whose active duty is voluntarily or involuntarily extended during a period when the President is authorized to order units of the Ready Reserve or members of a Reserve component to active duty shall have the service limitation governing eligibility for reemployment rights under paragraph (2) (A) of this subsection extended by his period of such active duty, but not

to exceed that period of active duty to which the President is authorized to order units of the Ready Reserve or members of a Reserve component: *Provided*, That with respect to a member who voluntarily enters upon active duty or whose active duty is voluntarily extended the provisions of this paragraph shall apply only when such additional active duty is at the request and for the convenience of the Federal Government.

(3) Any member of a reserve component of the Armed Forces of the United States who is ordered to an initial period of active duty for training of not less than three consecutive months shall, upon application for reemployment within thirty-one days after (A) his release from that active duty for training after satisfactory service, or (B) his discharge from hospitalization incident to that active duty for training, or one year after his scheduled release from that training, whichever is earlier, be entitled to all reemployment rights and benefits provided by this section for persons inducted under the provisions of this title [sections 451, 453, 454, 455, 456 and 458–471 of this Appendix], except that (A) any person restored to a position in accordance with the provisions of this paragraph shall not be discharged from such position without cause within six months after that restoration, and (B) no reemployment rights granted by this paragraph shall entitle any person to retention, preference, or displacement rights over any veteran with a superior claim under the Veterans' Preference Act of 1944, as amended.

(4) Any employee not covered by paragraph (3) of this subsection who holds a position described in paragraph (A) or (B) of subsection (b) of this section shall upon request be granted a leave of absence by his employer for the period

required to perform active duty for training or inactive duty training in the Armed Forces of the United States. Upon his release from a period of such active duty for training or inactive duty training, or upon his discharge from hospitalization incident to that training, such employee shall be permitted to return to his position with such seniority, status, pay, and vacation as he would have had if he had not been absent for such purposes. He shall report for work at the beginning of his next regularly scheduled working period after expiration of the last calendar day necessary to travel from the place of training to the place of employment following his release, or within a reasonable time thereafter if delayed return is due to factors beyond the employee's control. Failure to report for work at such next regularly scheduled working period shall make the employee subject to the conduct rules of the employer pertaining to explanations and discipline with respect to absence from scheduled work. If that employee is hospitalized incident to active duty for training or inactive duty training, he shall be required to report for work at the beginning of his next regularly scheduled work period after expiration of the time necessary to travel from the place of discharge from hospitalization to the place of employment, or within a reasonable time thereafter if delayed return is due to factors beyond the employee's control, or within one year after his release from active duty for training or inactive duty training, whichever is earlier. If an employee covered by this paragraph is not qualified to perform the duties of his position by reason of disability sustained during active duty for training or inactive duty training, but is qualified to perform the duties of any other position in the employ of the employer or his successor in interest, he shall be restored by that employer or his successor

in interest to such other position the duties of which he is qualified to perform as will provide him like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in his case.

(5) Any employee not covered by paragraph (3) of this subsection who holds a position described in paragraph (A) or (B) of subsection (b) of this section shall be considered as having been on leave of absence during the period required for the purpose of being inducted into, entering or determining by a preinduction or other examination his physical fitness to enter the Armed Forces of the United States. Upon his rejection, upon completion of his preinduction or other examination, or upon his discharge from hospitalization incident to that rejection or examination, such employee shall be permitted to return to his position in accordance with the provisions of paragraph (4) of this subsection.

(6) For the purposes of paragraphs (3) and (4) of this subsection, full-time training or other full-time duty performed by a member of the National Guard under section 316, 503, 504, or 505 of Title 32, is considered active duty for training; and for the purpose of paragraph (4) of this subsection; inactive duty training performed by that member under section 502 of Title 32, or [former] section 301 of Title 37 [now sections 206,301,309,402 and 1002 of Title 37] is considered inactive duty training.

* * * * *

APPENDIX III

Portions of Title 5 of the U. S. Code

§ 5551. Lump-sum payment for accumulated and accrued leave on separation

(a) An employee as defined by section 2105 of this title or an individual employed by the government of the District of Columbia, who is separated from the service or elects to receive a lump-sum payment for leave under section 5552 of this title, is entitled to receive a lump-sum payment for accumulated and current accrued annual or vacation leave to which he is entitled by statute. The lump-sum payment shall equal the pay the employee or individual would have received had he remained in the service until expiration of the period of the annual or vacation leave, except that it may not exceed pay for a period of annual or vacation leave in excess of 30 days or the number of days carried over to his credit at the beginning of the leave year in which entitlement to payment occurs, whichever is greater. The lump-sum payment is considered pay for taxation purposes only.

§ 5552. Lump-sum payment for accumulated and accrued leave on entering active duty; election

An employee as defined by section 2105 of this title or an individual employed by a territory or possession of the United States or the government of the District of Columbia who enters on active duty in the armed forces is entitled to—

(1) receive, in addition to his pay and allowances from the armed forces, a lump-sum payment for accumulated and current accrued annual or vacation leave in accordance with section 5551 of this title; or

(2) elect to have the leave remain to his credit until his return from active duty.

§ *6302. General provisions*

(a) The days of leave provided by this subchapter are days on which an employee would otherwise work and receive pay and are exclusive of holidays and non-workdays established by Federal statute, Executive order, or administrative order.

(b) For the purpose of this subchapter an employee is deemed employed for a full biweekly pay period if he is employed during the days within that period, exclusive of holidays and nonworkdays established by Federal statute, Executive order, or administrative order, which fall within his basic administrative workweek.

(c) A part-time employee, unless otherwise excepted, is entitled to the benefits provided by subsection (d) of this section and sections 6303, 6304 (a), (b), 6305(a), 6307, and 6310 of this title on a pro rata basis.

(d) The annual leave provided by this subchapter, including annual leave that will accrue to an employee during the year, may be granted at any time during the year as the head of the agency concerned may prescribe.

§ *6303. Annual leave; accrual*

(a) An employee is entitled to annual leave with pay which accrues as follows—

(1) one-half day for each full biweekly pay period for an employee with less than 3 years of service;

(2) three-fourths day for each full biweekly pay period, except that the accrual for the last full biweekly pay period in the year is one and one-fourth days, for an employee with 3 but less than 15 years of service; and

(3) one day for each full biweekly pay period for an employee with 15 or more years of service.

In determining years of service, an employee is entitled to credit

for all service creditable under section 8332 of this title for the purpose of an annuity under subchapter III of chapter 83 of this title. * * *